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No. 82-734
IN THE

Supreme Court of the United States

October Term, 1982

TIRSO DEL JUNCO, WALTER L. RASIC, ANDRES ALONZO, JR., C.V. HOLDER, MARTIN CASTILLO, GRACE C. QUINN, ANTONIO E. VALLE, GILBERT R. VASQUES, HAL W. BROWN, JR.,

Petitioners,

vs.

C.T. CONOVER, Comptroller of the Currency, Office of the Comptroller of the Currency, Department of the Treasury,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

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Respondent.

PETITIONERS' REPLY BRIEF.

Respondent, in his opposing brief, raises for the first time an issue mentioned but not decided by the Ninth Circuit. Respondent claims the legislative history of 12 USC (Supp. V) Section 1818(b)(i) ("Section 1818") and the relevant case law, do not indicate a Congressional intent to incorporate the 12 USC Section 93 ("Section 93") "intentional violation" standard into Section 1818 proceedings. Accordingly, Respondent argues Petitioners' reliance on cases, such as *Corsicana National Bank v. Johnson*, 251 U.S. 68 (1919), which construe Section 93, is misplaced. (Brief in Opp. p. 9)

Respondent ignores a basic rule of statutory interpretation which provides that where a statute has been judicially con-

strued for a period of sufficient duration to provide Congress with adequate opportunities to modify the statute and it has not done so, congressional inaction or silence in this context is persuasive evidence of its satisfaction with the judicial interpretation of the statute, especially when Congress has amended the statute in other respects. [*Missouri v. Ross*, 299 U.S. 72, 75 (1936); *United States v. Elgin, J. & E. R. Co.*, 298 U.S. 492, 500 (1935).]

Since 1907 it has been established, that before personal liability may be imposed on a director for the damages caused by a violation of the National Bank Act which includes 12 USC section 84 (''Section 84'') and Section 93, it must be established that the director intentionally or knowingly violated the statute. The establishment of mere negligence is not sufficient.

> ''. . . [T]he statute imposes certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of this title'. . . . [W]here by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required; that is, that the violation must in effect be intentional. . . .''
>
> *Yates v. Jones National Bank*, 206 U.S. 158, 176-180 (1907).[1]

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[1]See also: *Bailey v. Babcock*, 241 F. 501 (1915); *McCormick v. King*, 241 F. 737 (1917); *Curtis v. Metcalf*, 265 F. 293 (1918); *First Nat. Bank of Fairbanks v. Noyes*, 257 F. 593 (1919); *Gamble v. Brown*, 29 F. 2d 366 (1928); *Ringeon v. Albinson*, 35 F. 2d 753 (1929); *Payne v. Ostrus*, 50 F. 2d 1039 (1931); *Anderson v. Akers*, 9 F. Supp. 151 (1934); *Deitrick v. Ames*, 24 F. Supp. 1 (1938); *Stein v. Galitz*, 478 F. Supp. 517 (1978); 11 ALR Fed. 606.

In 1978 Congress had an opportunity to change this interpretation when it amended Section 93 by dividing it into Sections (a) and (b) and also amended Section 1818. However, Congress did not change any of Section 93's original language but did add some new remedies that were not previously available to Respondent, such as the assessment of civil money penalties. (For legislative history and purpose of 1978 amendment of Sections 93 and 1818 see 1978 U.S. Code Cong. and Adm. News p. 9273.) By not changing any of the original language of Section 93 Congress may be deemed to be satisfied with the established judicial interpretation of the relationship between Sections 84 and 93 cited above even with respect to Section 1818 proceedings. (*Missouri v. Ross, supra.; United States v. Elgin, J. & E. R. Co., supra.*)

Another applicable rule of statutory interpretations states.

> "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation. . . ."
>
> *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381-382 (1969).

In previous Section 1818 proceedings brought by Respondent against other directors of other national banking associations, Respondent has consistently asserted that Section 93 applies in such proceedings when directors are required by a cease and desist order to indemnify a bank for loans which violate Section 84. Respondent made this disclosure in an offer of proof filed in response to the Administrative

Law Judge's ("ALJ") request for copies of previous cease and desist orders and agreements.

Even though a court has never decided this issue of whether Section 93 applies to Section 1818, when one considers the legislative and administrative history of these three sections it is evident that Congress and Respondent both acknowledge that Section 93 applies to a Section 1818 proceeding. Accordingly, reliance on cases construing Section 93, such as *Corsicana*, is not misplaced. Rather these cases temper Respondent's desire to extend the scope of his remedial powers beyond what was contemplated by Congress in enacting Sections 93 and 1818; they also establish what the appropriate remedial order should have been in this case: one which limits Petitioners' liability to the unpaid balance of the two illegal loans.

The importance and substantiality of the questions presented in the petition have not been denied by Respondent. Further, since this Court has never addressed itself to the relationship between Sections 1818, 84 and 93 (including the cases interpreting those sections) there are compelling reasons why some definitive guidelines in the application of Section 1818's remedial powers should now be established by this Court, especially with regard to the extent to which those powers may be used to alter national bank directors' personal liability for excess loans.

Respectfully submitted,

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